

LAURA VARGAS

V.

Respondent

and

Insurance Carrier

All of the grounds alleged by claimant's counsel supporting his request to change the ALJ arise from two claims: *Aida Brown v. Aberdeen Village, et al.*, Docket Nos. 1,055,200 & 1,055,201. In those claims, C. Albert Herdoiza represented the claimant and Gary E. Jones,

then engaged in private law practice, represented the respondent. The *Aida Brown* claims are the only claims in which Mr. Herdoiza and Mr. Jones ever faced each other as opposing counsel. Mr. Herdoiza claims on page one of his Affidavit that during the litigation of Ms. Brown's claims, Mr. Jones engaged in conduct exceeding the adversarial conflict normally expected or anticipated between opposing attorneys. Among the other allegations set forth in Mr. Herdoiza's Affidavit are:

1. On September 29, 2011, Mr. Jones notified Mr. Herdoiza's office that a court-ordered IME with Terrence Pratt, M.D., was scheduled on December 29, 2011. On November 30, 2011, Mr. Jones forwarded to Mr. Herdoiza an unsigned proposed joint letter to the doctor confirming the appointment and listing the medical records to be transmitted to Dr. Pratt. Mr. Herdoiza signed the joint letter and, on December 20, 2011, returned to Mr. Jones the joint letter and the medical records to be provided to Dr. Pratt.

2. Mr. Jones received the proposed medical records to be sent to Dr. Pratt, but he did not agree to send Dr. Egea's reports because Mr. Herdoiza had requested Dr. Egea's bill be paid as unauthorized medical when the doctor's impairment rating was based on only one examination. Judge Howard and/or his administrative assistant reportedly stated in a telephone call that if either party objected to any medical records, they should not be sent to Dr. Pratt.

3. Mr. Herdoiza informed Mr. Jones that because of the latter's refusal to allow Dr. Egea's reports to be forwarded to Dr. Pratt, Mr. Herdoiza would not agree to the inclusion of Dr. Reed's reports. At some point, respondent paid unauthorized medical for Dr. Egea's examination, however, Mr. Herdoiza's office did not negotiate the unauthorized medical check. Mr. Herdoiza's office proposed to return the unauthorized medical check to Mr. Jones, thus arguably making untenable Mr. Jones' position that Mr. Herdoiza violated the unauthorized medical statute. It was further proposed that if Mr. Jones agreed to Dr. Egea's reports, Mr. Herdoiza would agree to Dr. Reed's reports.

4. Mr. Herdoiza attempted to contact Judge Howard about Dr. Egea's reports, but the ALJ was unavailable. Mr. Herdoiza alleges he then had to decide whether or not to compromise Ms. Brown's interests by proceeding with the IME without Dr. Egea's reports. Mr. Herdoiza was unwilling to reschedule the IME because Ms. Brown had waited three months for the IME and because a substantial cancellation fee would have to be paid. According to Mr. Herdoiza, Mr. Jones' actions were unreasonable, resulting in turmoil and inconvenience.

5. According to Mr. Herdoiza, although Judge Howard's September 19, 2011, order appointing Dr. Pratt as neutral physician prohibited counsel from *ex parte* communications with the court-ordered doctor, Mr. Jones sent a letter to Dr. Pratt requesting a task loss opinion.

6. Although ALJ Howard normally only took stipulations at regular hearings, Mr. Jones told Mr. Herdoiza he had secured Judge Howard's consent to hear claimant's testimony at the regular hearing. At the regular hearing on June 5, 2012, Judge Howard only took stipulations.

7. At the regular hearing, it was asserted that the insurance company had paid unauthorized medical for Dr. Egea's examination in the amount of \$475. Mr. Herdoiza stated

that amount would be repaid if Dr. Egea's deposition was taken for the purpose of offering his rating into evidence.

8. The regular hearing testimony of Ms. Brown was taken by evidentiary deposition at Mr. Herdoiza's office on the same day as the regular hearing was held.

9. At Ms. Brown's deposition, Mr. Jones questioned her regarding her appointment to see Dr. Egea on April 27, 2011. Mr. Herdoiza objected because claimant did not know anything about unauthorized medical, and because counsel had already talked to Judge Howard on the record at the regular hearing about unauthorized medical.

10. Mr. Herdoiza stated if Mr. Jones intended to question Ms. Brown about unauthorized medical, they were finished for the day.

11. Mr. Jones proposed that if Mr. Herdoiza stipulated to certain facts, Mr. Jones would not ask Ms. Brown about unauthorized medical, but if there were no such stipulation, Mr. Jones was entitled to question her on that subject. Mr. Jones stated it was Mr. Herdoiza's request to only take stipulations at the regular hearing and if Mr. Herdoiza did not allow Ms. Brown to testify, he would ask the judge to strike her entire testimony. Mr. Herdoiza responded that Mr. Jones told his office Judge Howard had agreed to take evidence and not only stipulations at the regular hearing. Mr. Herdoiza asserted he hired an interpreter and produced Ms. Brown to testify at the regular hearing. Mr. Herdoiza alleged when Judge Howard only took stipulations at the hearing, Mr. Herdoiza agreed to allow Mr. Jones to come to his office to do the regular hearing testimony of Ms. Brown by deposition.

12. Mr. Jones again stated Mr. Herdoiza requested Dr. Egea's bill be paid as unauthorized medical, then based on the same examination, Mr. Herdoiza requested Dr. Egea rate claimant's permanent impairment of function. Mr. Jones reiterated Mr. Herdoiza violated the statute prohibiting unauthorized medical be used to obtain a rating.

13. Mr. Jones asserted if Ms. Brown had no information about unauthorized medical, she could simply testify to that effect. Mr. Herdoiza refused to stipulate to the facts proposed by Mr. Jones and stated that if Mr. Jones had questions about something other than unauthorized medical, he could ask, otherwise they would adjourn the deposition.

14. Mr. Jones stated he had questions about unauthorized medical. Mr. Herdoiza said they were adjourned and he and the witness left the room. Mr. Herdoiza returned and Mr. Jones stated because Mr. Herdoiza directed Ms. Brown to leave, he would ask for penalties and sanctions because he was not finished when Mr. Herdoiza terminated the deposition. Mr. Herdoiza said Mr. Jones would have to take up the matter with the court and he would make Ms. Brown again available to testify.

15. Because Mr. Jones refused to ask other questions, Mr. Herdoiza terminated the proceedings, after which Mr. Jones refused to leave Mr. Herdoiza's office. The discussion became heated and Mr. Jones stated he had never been treated in a like manner and he would never forget it.

16. According to Mr. Herdoiza, in 33 years of law practice, he had never stopped testimony to ask opposing counsel to leave his office. Mr. Herdoiza states no respondent attorney ever threatened Mr. Herdoiza as Mr. Jones did. Much of the hostile exchange was not in the record.

17. Mr. Herdoiza scheduled the deposition of Aberdeen Village human resources director, Kenneth Gitobu, on June 26, 2012. Mr. Herdoiza had a subpoena duces tecum served on Mr. Gitobu, with a copy faxed to Mr. Jones' office, on June 25, 2012, for production of Ms. Brown's payroll records and personnel file.

18. At Mr. Gitobu's deposition, Mr. Herdoiza asked the witness to produce Ms. Brown's workers compensation file, but Mr. Jones objected because the file was not subpoenaed and he, Mr. Jones, had not looked at the file. The file was not produced despite its presence in the same building as the deposition being taken.

19. Mr. Herdoiza claims Mr. Jones violated K.S.A. 44-515 by offering into evidence an MRI report during cross-examination of Dr. Egea on June 26, 2012. According to Mr. Herdoiza, Mr. Jones failed to provide the MRI report to the court-ordered examining physician, Dr. Pratt, or to the authorized treating physician, Dr. Reed.

20. Mr. Herdoiza asked Mr. Jones if the report had been shared with Mr. Herdoiza's office. Mr. Jones responded that Mr. Herdoiza could make an objection, but Mr. Jones was not going to respond to Mr. Herdoiza's questions. Mr. Herdoiza said Mr. Jones could answer the question whether the report was shared with his office, with Dr. Pratt or with the court. Mr. Jones refused to answer the question.

21. Mr. Herdoiza contacted Mr. Jones' office seeking an agreement to extend the terminal dates to schedule additional depositions but, according to Mr. Herdoiza, Mr. Jones ignored all contacts. Mr. Herdoiza filed a Motion to Extend Terminal Dates because Mr. Jones failed to return phone calls or agree to the extension. Mr. Herdoiza claims Mr. Jones' "delay tactics"¹ were unnecessary and wasted hours of Mr. Herdoiza's and his staff's time.

22. In July 2013, Mr. Herdoiza notified Mr. Jones that Ms. Brown agreed to settle her claims if the settlement checks were at the settlement hearing and there were no further delays. Just prior to the August 26, 2013, settlement hearing, Mr. Jones insisted Ms. Brown sign a release seven days prior to the settlement hearing. The settlement hearing was rescheduled on September 3, 2013, but Mr. Jones did not bring the checks to the hearing. Mr. Jones promised the checks would be mailed promptly. Mr. Herdoiza's office contacted Mr. Jones' office requesting the status of the checks, but Mr. Jones did not return the calls. Mr. Herdoiza served a Demand for Compensation that was received by Mr. Jones on September 20, 2013. The checks that arrived in Mr. Herdoiza's office on September 25, 2013, were issued by the insurance company on August 14, 2013.

¹ Herdoiza Affidavit at 3.

23. According to Mr. Herdoiza, his relationship with Mr. Jones far exceeded the adversarial relationship which was, at times, contentious and acrimonious, as stated in the October 15, 2014, Order. Mr. Herdoiza asserts Mr. Jones' actions and delays added costs and unnecessary litigation. Mr. Herdoiza states he has no reservations to appear before any Board Member with whom he previously had an adversarial relationship. After the occurrence at the regular hearing by deposition, when Mr. Herdoiza claims Mr. Jones left his office angrily proclaiming that he would never forget it, Mr. Herdoiza alleges he did not believe that ALJ Jones could be fair and objective in any case Mr. Herdoiza brought. Mr. Herdoiza believes his client would not receive fair, adequate and impartial treatment by ALJ Jones.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-523 provides in relevant part:

(e)(1) If a party or a party's attorney believes that the administrative law judge to whom a case is assigned cannot afford that party a fair hearing in the case, the party or attorney may file a motion for change of administrative law judge. A party or a party's attorney shall not file more than one motion for change of administrative law judge in a case. The administrative law judge shall promptly hear the motion informally upon reasonable notice to all parties who have appeared in the case. Notwithstanding the provisions of K.S.A. 44-552, and amendments thereto, the administrative law judge shall decide, in the administrative law judge's discretion, whether or not the hearing of such motion shall be taken down by a certified shorthand reporter. If the administrative law judge disqualifies the administrative law judge's self, the case shall be assigned to another administrative law judge by the director. If the administrative law judge refuses to disqualify the administrative law judge's self, the party seeking a change of administrative law judge may, within 10 days of the refusal, file an appeal with the workers compensation [appeals] board.

(2) The party or a party's attorney shall file with the workers compensation [appeals] board an affidavit alleging one or more of the grounds specified in subsection (e)[(4)].

(3) If a majority of the workers compensation [appeals] board finds legally sufficient grounds, it shall direct the director to assign the case to another administrative law judge.

(4) Grounds which may be alleged as provided in subsection (e)(2) for change of administrative law judge are that:

(A) The administrative law judge has been engaged as counsel in the case prior to the appointment as administrative law judge.

(B) The administrative law judge is otherwise interested in the case.

(C) The administrative law judge is related to either party in the case.

(D) The administrative law judge is a material witness in the case.

(E) The party or party's attorney filing the affidavit has cause to believe and does believe that on account of the personal bias, prejudice or interest of the administrative law judge such party cannot obtain a fair and impartial hearing. Such affidavit shall state the facts and the reasons for the belief that bias, prejudice or an interest exists.

(5) In any affidavit filed pursuant to subsection (e)(2), the recital of previous rulings or decisions by the administrative law judge on legal issues or concerning prior motions for change of administrative law judge filed by counsel or such counsel's law firm, pursuant to this subsection, shall not be deemed legally sufficient for any belief that bias or prejudice exists.

(6) Notwithstanding the provisions of K.S.A. 44-556, and amendments thereto, no interlocutory appeal to the court of appeals of the workers compensation appeals board's decision regarding recusal shall be allowed while the resolution of the claim for compensation is pending before an administrative law judge or the workers compensation appeals board.

The Board has carefully considered the entire record, including the Affidavit prepared by claimant's counsel, and the exhibits attached to the Affidavit, and finds that the ALJ's October 15, 2014, Order denying claimant's motion for change of administrative law judge should be affirmed.

Both Mr. Herdoiza and Mr. Jones zealously represented the interests of their clients in the litigation of the *Aida Brown* claims. The emotions of counsel in those claims ran particularly high and perhaps actions were taken and words were exchanged which might later be viewed as regrettable. It is not the function of the Appeals Board under these circumstances to identify statements or actions that are or may be improper. Rather, the Board must determine whether there are legally sufficient grounds to conclude, on account of a personal bias, prejudice or interest of the ALJ, Ms. Vargas cannot obtain a fair and impartial hearing.

The burden of proof should be on the movant and, in the opinion of the Board, claimant has not sustained her burden to prove the requirements under K.S.A. 2013 Supp. 44-523(e) necessary to disqualify the ALJ. The Board is persuaded under the circumstances of this claim Judge Jones understands and appreciates the differing roles of an attorney representing a party and an ALJ to whom a claim has been assigned for hearing. The preponderance of the evidence in this record fails to prove that the ALJ has any bias, prejudice or interest that would interfere with claimant's right to obtain a fair and impartial hearing. Because legally sufficient grounds for disqualification have not been proven, the Order of which review is sought must be affirmed.

CONCLUSIONS

1. The ALJ does not have personal bias, prejudice or interest such that claimant cannot receive a fair and impartial hearing.
2. Claimant's Motion for Change of Administrative Law Judge was properly denied by the ALJ.

DECISION

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Gary K. Jones dated October 15, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
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Honorable Gary K. Jones, Administrative Law Judge